CLOSE THE GAP: NLRB AND PUBLIC EMPLOYEES

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On January 15, 1966, when reaction to a strike by public employees of the New York City transit system had ascended to apoplectic pitch, the Scripps Howard newspapers in tight-lipped acerbity scratched out an editorial plea: "Close the gap. The strike reveals a broad gap in present labor law which permits the public to be savagely victimized by ruthless labor barons. . . . The primary fault is that the Taft-Hartley Act specifically states that none of its provisions apply to public employees."

The plea and the remedy might well have been stuffed into a bottle and tossed into the Atlantic for all the ripples they caused in our own country. Had the message reached almost any portion of the shoreline of Western Europe, it would have been accorded a far warmer reception than it received here. No reactions at all disturbed the domestic seismographs; and the strike—and tempers—eventually sputtered to an inconclusive halt. Four years, and many such strikes later, find us still the pained victims of the dread disease—"gaposis" of the labor law.

Axiomatic appears to be the proposition that twelve million public workers in the United States shall not enjoy, indulge or otherwise utilize the economic rights of private workers, particularly the right to strike against their government employers. Rivalling in intensity this carefully preserved pre-conception is the conviction that employees of our federal, state and local governments must not be required to join or pay dues to a labor organization as a condition of continued employment. Less obsessive in a gradually relaxing scale, but at one time equally tabooed with the above, are current attitudes toward the delegation by government of authority to a neutral third party to render binding decisions regarding employee grievances, the right of government to enter into a legally enforceable contract with a labor union, the right to bilaterally sign labor agreements, the right to grant recognition to one labor organization as the sole and exclusive agent for all employees in a prescribed unit—thus denying equal application of the laws to other organizations, the right to deny managerial employees the union privileges accorded others, the right of public employers to recognize the majority will of their employees through the secret ballot or other acceptable means, indeed the right to recognize the right of public workers to join bona fide labor organizations of their own choosing.

"Of their own choosing." For millions of Americans employed, if they were fortunate enough, in the mines, the mills, the factories and construction in the mid-'30s, this phrase became the battle cry of eco-

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nomic freedom. The National Industrial Recovery Act, and in 1935 the National Labor Relations Act, proclaimed the right of American workers to join unions of their own choosing. Employers were required under penalty of the National Labor Relations Act to respect that right. A National Labor Relations Board, its members appointed for staggered terms by the President and removable only for cause, was established as an independent regulatory agency for purposes of administering the law. Independent of the Chief Executive and the Congress, at least in its routine administrative chores, the National Labor Relations Board would seek to bring peace with justice to the turbulent labor scene generally, but not however to "make the whole scene." For, only those employed by enterprise substantially involved in interstate commerce were protected by the law. Specifically excluded were employees of the Federal government, the states and their political subdivisions, and of private, non-profit institutions such as hospitals and colleges. Farm workers were also set aside, as were those employed in intrastate commerce. Although coverage under the Act has since been broadened, notably in the inclusion of the hotel industry and through a more liberal definition of interstate commerce, there has been no serious effort in thirty-five years to apply the Act to public employees at any level of government.

State and local government employees were excluded in 1935 ostensibly because public agencies were not considered to be "enterprises" under the meaning of the Act, nor were they construed to be factors in "commerce." Further, Congressional regulation of state and local employees' conditions of work would have been branded an immoral and unconstitutional invasion of state sovereignty. Other New Deal legislation of the period—Social Security, Fair Labor Standards, Unemployment Compensation—also excluded public employees and their "sovereign" employers. It has since been suggested that exclusion of public workers was motivated less by constitutional principle than by political patronage, that political leaders were determined to protect their prerogatives to dole out public jobs to the faithful, collect kickbacks from them, and generally run the plantation without interference. In any event, however mixed and impure the motivation, while unionization mushroomed in sectors protected by the National Labor Relations Board, it lagged in those areas of employment that remained vulnerable to employer reprisal. The public services, particularly at the state and local levels, expanded rapidly in numbers employed, but only negligibly in numbers unionized.

It appears that public employees, non-profit institutional employees and agricultural workers continue to be denied coverage of the National Labor Relations Act precisely because powerful interest groups have successfully fought to impede legitimate unionization in these fields. Scripps-Howard newspapers may have been right on the mark when they

editorialized further at the time of the 1966 New York City transit strike: ". . . the National Labor Relations Act specifically states none of its provisions apply to public employees. This was written in because Congress did not want unions of public employees to have the full bargaining powers, use of National Labor Relations Board procedures, strike privileges and other rights granted ordinary unions." No mention here of "sovereignty," "state's rights," "federalism," "constitutionality," even "civil service." The editorial writer is not at all concerned over the deprivation suffered by public workers. He does not issue the call for a day of atonement for the sins of omission. On the contrary, he slices deftly through the mythos that has for too long blurred the reality of public employment, perceives truth pure and pulsating, and, in pursuit of "justice" for the *public*, demands that public employees be compelled to adhere to the provisions of the Taft-Hartley Act! The self interest of employers and employees gives way to the need, as understood by the editorial writer, for imposition of the strike-deterring features of the national labor law in a dispute which is severe, but local in impact. Pure power considerations apparently explain why public employees have until now been exempt from the rights—and the responsibilities—of the National Labor Law. Ironically, public demand to be protected from increasingly powerful public employee unions may be the precipitating factor that results in coverage under the National Labor Relations Board.

In 1950 one out of ten American workers was employed by a public agency. By 1966, the ratio was one to seven. It has been estimated that in 1975 fully twenty per cent of the work force in the United States will be on a public payroll. Millions more are employed by quasi-public institutions, including hospitals and nursing homes. Many others who work for gas, electric, communications and transit utilities may be private employees covered by the National Labor Relations Board today, and public employees uncovered tomorrow, or the reverse, or the double reverse. Despite the changing character of the work force, and the mixed bag of relatively essential services presently dispensed by government agencies (from police to parking lots), and by private enterprise (from destruction to deodorants), we persist in maintaining a dual value system which has relegated public employment as such to less than equal status.

Inferior rights tend to produce inferior conditions. Fully established labor organizations in the covered sector have achieved wage levels that far surpass salaries paid for similar work in uncovered employment. Unskilled or skilled, jobs in protected categories bring pay rates that are consistently higher. The custodial worker in an auto plant makes in excess of $1.00 per hour more than the average custodial worker, organized or unorganized, in public employment. The laborer employed in cov-

ered corporate construction, union or non-union, earns far more than the laborer in uncovered corporate agriculture.

Most public employees are denied the minimum wage and overtime pay guarantees of the federal Fair Labor Standards Act. The law has been mandatory since 1938 for workers in interstate commerce, and since a 1967 amendment, is applicable to public and private employees in the schools, universities and hospitals. But hundreds of thousands, perhaps millions, of uncovered public workers today do not receive time and one half pay for work performed in excess of forty hours in a week. Often they are required to take equal compensatory time off rather than have even the minor benefit of straight time cash pay for overtime worked. Because FLSA did not until recently apply to any public employees, it has been convenient for public employers, as they have done over collective bargaining, to read into the omission an implied prohibition on their power to bargain and similarly on their authority to grant overtime premium pay. Having successfully evaded coverage, they then use the federal exclusion to righteously justify their subsequent refusal to assert the "state's right" to act of its own volition. Although FLSA has from its inception required only that work beyond forty hours in one calendar week be compensated at no less than time and one half, covered workers who have also had the protection of the National Labor Relations Board tend frequently to enjoy contract clauses that provide for premium pay for time worked beyond eight hours in any one day, or for hours worked on Saturday or Sunday, regardless of the total number of hours worked through the week. Double time is commonplace for Sunday work as such. Public employees, late bloomers, are only now generally experiencing the minimal standards of the Fair Labor Standards Act.

The Federal foundation for a national system of unemployment compensation was set in 1935. Each state, however, was left to determine within broad limits the amount and duration of weekly benefits. Again, although coverage is mandatory for all but the very smallest private profit enterprise, public agencies, even those employing thousands of workers, have been exempt from the compulsory features of the Federal law. Not that the question of lay-off is academic in state and local government. The winds of political chance and of economic adversity do from time to time shake the branches of the civil service, dislodging public employees from supposedly secure perches. Ironically, workers in state unemployment offices are likely candidates for lay-off whenever employment rises in the private sector. Nevertheless, with the exception of but a few states, unemployment compensation is denied public employees. The ten states that cover public workers do so voluntarily, taking advantage of a permissive feature presently part of the Federal Law.

Workmen's compensation for job-incurred injury or illness is con-

trolled entirely by the states. There are no Federal guidelines. The states have established mandatory systems of coverage which generally provide benefit patterns that are related to those which obtain for unemployment compensation. However, only half the states have bothered to include state and local government employees under their workmen's compensation programs.

Although state and local government employment is the fastest growing sector of the American economy, and threatens soon to entrap fully a fifth of the work force within its less than equal enclave, only a minimal effort has been made to apply federally guaranteed rights to all of public employment. Public employers, because *they* are no different from *their* counterparts in private employment, prefer it this way. Scratch any employer, private or public, and you reveal a man at once possessive of his prerogatives, fearful of interference from any source—especially the Federal Government—sensitive to criticism, and personally affronted by the unionization of "his" employees. His love of the status quo is perfectly understandable. But, the notion that public employment by its nature is "different" infects the thinking of all Americans, including public employees and their unions.

Academicians assume an inherent difference. The author of a scholarly work regarding private strikes that affect the public interest, disposes of the public sector of the economy with one stale sentence: ". . . strikes by government employees . . . present such unique legal and political problems that they deserve separate consideration."[1] Everett M. Kassalow, a former functionary of the AFL-CIO, in an article entitled "Trade Unionism Goes Public" in the Winter, 1969 issue of *The Public Interest*, draws upon AFL-CIO President George Meany to support his separatist views: "Although Meany recommended a number of changes in the workings of (Federal Executive Order 10988 covering Federal employees) he did not question the ban on strikes." Kassalow, thus fortified, attacks Theodore Kheel's criticism of the New York State Taylor Act: "In (Kheel's) refusal to make any distinction between public and private collective bargaining, so far as the right to strike is concerned . . . he does go too far." Where the sovereignty doctrine used to be sufficient to delineate the public from the private sector, it is interesting that the arguments are now joined, at least among scholars, on a more rational level. Jack Stieber, for example, in his "Collective Bargaining in the Public Sector," in *Challenges to Collective Bargaining*, edited by Lloyd Ullman, lists a series of distinctive points based on the notions that government service is essential service, and that the strike is an economic weapon inappropriate in public employment. Stieber recognizes that an

[1] D. E. CULLEN, NATIONAL EMERGENCY STRIKES 8 (New York State School of Industrial and Labor Relations, 1968).

essential service may be public *or* private, and that not all public service is essential. His argument centers, therefore, on the thesis that in private industry employers have countervailing rights to the strike: "They may lock out their employees, try to break the strike by operating with other employees, suspend operations . . . ; they may even choose to go out of business entirely . . . both parties are subject to market pressures (except for certain monopoly industries *e.g.*, telephones)." According to Steiber, public employers do not have access to these weapons, and are therefore at a disadvantage when confronted with a striking union. Note the change in imagery. Government is now the underdog, the immovable target that must have special protection from public employee unions! Defense of the "difference doctrine" is, however, not so immutable. It takes on diverse forms as circumstances shift, but the *a priori* point remains. Perhaps academicians need the uniqueness theory in order to nourish the new study area of public labor relations, an area that seems to become more specialized in geometric proportion to the number of words written in support of its uniqueness.

There appears to be generally in the United States a material and psychological need to harp on the uniqueness of public employment. The American people have throughout our history tended to view government as a detached "them" institution, an institution that has "taken" from the people more than it has "given." From the tax collectors of George III to the tax collectors of the modern day, government employees have enjoyed (if they are masochists) a special status in American life. Middle class mythology marked the public employee as "the man who couldn't make it" in the tough competition of private enterprise. No Alger he, the government worker! Often he has been viewed with contempt as the recipient of political reward, a man of no merit or training. His job was, in many cases still is, part of the spoils of political war. Where the merit system has joined the spoils system (it never fully supplants it), the stress is on security even at the expense of salary comparable with that of similar private employment, and indeed at the sacrifice of the fundamental right of political and economic expression. It is understood that the public employee in the United States is politically and economically "different."

Public employees, their unions, and the labor movement of which they are a part recognize, and to an important extent accept, this separate status, and react in separate, yet essentially similar ways. Top labor leaders, for example, have left the impression that compulsory arbitration may be a reasonable substitute for the strike in the public service. With equal alacrity, they would reject out of hand, however, the suggestion that arbitration should be compelled in *any* dispute involving private employment. They hesitate as a result to advocate extension of the Na-

tional Labor Relations Act to public employment out of fear that such inclusion would necessarily jeopardize the rights of private workers.

Organized labor at the local level often adopts an uncertain, ambivalent stance as it confronts the anamoly of unionization of public employees. In the good old days, before public workers claimed in earnest the right to collective bargaining, local labor leaders were often content with "a piece of the action" involving public employment. Certain patronage positions were perhaps made available to leaders of labor; it might have been understood that skilled craftsmen employed by the city or county would be recruited by way of recommendation of the appropriate craft union business agent; that public works contracts would go only to union contractors; that the little favors having to do with the courts and the police would be enjoyed. Labor organizations, seeking in recent years to unionize rank and file public workers, naturally expected to have the support and protection of organized labor in the community, and for the most part, they got the help. Indeed, there are many public employee local unions flourishing today only because they were aided by local labor. But, the question of "protection" was a two-sided affair in many places, and still is even where the public union is finally well established. For the local labor leadership, "protection" involves the right of rank and file workers to join a legitimate union on the one hand, and on the other the retention of patronage and assorted perquisites that have come labor's way as the result of political alliances developed over the years. It may be considered equally imperative that in the best interests of the general labor movement both features be zealously guarded. Unfortunately, the two interests do not always coincide. What is good for the men may not be good for the mayor, and it is on such occasions that the life of the central labor council leader is not an easy one. He has to choose sides, or even pose as a neutral. Oddly, leaders of the general labor movement seem to have little difficulty adjusting to the role of mediator in disputes between public employees and their employers. This would be almost inconceivable if the antagonists were in the private sector. Similarly, in the matter of jurisdiction among several unions that assert claims within a particular public agency, the head of the local central labor body is likely to enter as a mediator where he would not if a private employer were involved. For mixed reasons, then, organized labor inclines to an inordinate involvement in the questions of public employee labor relations, and with others to an acceptance of basic differences as opposed to the private sector.

Individual unions whose membership is traditionally in private employment, for example in the building trades, have maintained a hybrid relationship with public employers in behalf of appropriate public employees who perform the work of the craft union, and who might have

been referred to the full-time public job by the union's agent. Such unions have been ill-prepared to cope with modern demands for standard bargaining relationships. Consider, for example, the public agency that employs full-time journeymen, all of whom were members of the union at the time they were hired, and who continue to pay union dues in the traditional way—through the window at the union office. No demand has been made of the public employer that he "check-off" dues; all members of the skilled local pay dues personally. Instead of a bargaining relationship, the union in conjunction with other crafts had earlier succeeded in persuading city council to adopt an ordinance which guarantees to craftsmen employed by the city a "prevailing" wage rate; that is, a wage fixed at a certain percentage of the pay rate negotiated by the union and the construction industry for the particular skill in private employment. Adjustments in wages are thus automatic; a letter to the city personnel department suffices. In the absence of a formal prevailing rate ordinance, the situation might require an actual meeting between the union agent and someone in city hall. But, "bargaining" was not expected to be very complicated. In such cities as Chicago, San Francisco and Cleveland, the public jurisdiction was carved to encompass more than the craft unions.

In such situations, frequently employees were referred by the union, or were expected to later join the union as an informal condition of employment. Although there were few contracts, rare strikes, and little collective bargaining, the arrangement ironically did provide often for a *de facto* union shop, and even a closed shop. National Labor Relations Board coverage of course would outlaw the latter. There are two edges to the blade that carefully separates out the public service. The exclusion that denies rights to the weak may very well give license to the strong.

Another set of essentially private unions has a keen interest in the unique character of public service labor relations. Unionists in the defense industries, particularly employees of those firms whose business is entirely with government, are very sensitive to the thin line that separates them from outright public employment. To nuclear, aerospace and weapons workers the old union refrain "Which Side Are You On?" carries special meaning as they contemplate growing demands that public corporations take over the private firms which now operate defense production for the Federal Government. Similarly, workers employed by private transit, gas, electric and communications utilities are from time to time threatened with public operation.

The prospect of "going public" is usually enough to precipitate panic among the employees involved, for the immediate expectation is a loss of union and political rights. Because of the virtually unchallenged conventional wisdom that public employment is by definition "different,"

workers almost always react negatively to proposals that would convert private enterprise to public operation.

When sick transit systems, for example, are dumped onto the public lap, the employees are frequently deprived of the rights they enjoyed as private workers. A few years ago the Amalgamated Transit Union, AFL-CIO, held a collective bargaining agreement with the then privately operated bus line in Dade County (Miami) Florida. Included in the contract, of course, was the right to strike; the employees were covered by the NLRB. The franchise was returned to the County for operation and the workers automatically became county employees. But Florida state law prohibits state and local government from recognizing unions that assert the right to strike. Dade County thereupon refused to recognize the Transit Union which had held bargaining rights for the same workers for many years. And of course an "illegal" strike erupted.

It is hardly surprising that the leaders and members of labor organizations in transportation and communications are extremely wary of suggestions to transfer transit, telephone and airline services to public ownership. They equate public employment, as do those unionists described earlier, with second class citizenship. They are fully aware that even in the few states and in the federal service where public employees do have the protected right to join unions of their choosing, such laws relegate public workers to a condition that is always separate and consequently never equal. Workers in the border-line industries tend as a result to swell the ranks of Americans who look at their governments with less than full confidence. Tragically, socially useful proposals that organized labor should normally be expected to support, run the risk of incurring labor's enmity.

John Kenneth Galbraith, in testimony before a Senate subcommittee in the spring of 1969, urged in the public interest that firms such as General Dynamics and Lockheed be made public corporations since almost their entire business is with the Federal Government. In the *New York Times Magazine* of November 16, 1969, Galbraith further encouraged the Democratic Party to make this proposal a plank of the Party's 1972 platform. But, in issuing this challenge to Democratic Party liberals, whose recent "respectability" he decries, Galbraith himself succumbs to the conventional wisdom regarding the rights of public employees. He writes in the *Times*: "By pretending that these essentially public firms are really private . . . we leave them free to engage in a good deal of lobbying and other political activity . . . by men who for practical purposes, are public employees." Such political freedom is denied by the Hatch Act to public employees, and Galbraith apparently feels that employees of the firms in question really are public employees and therefore should be restricted as such. He does not contest the wisdom that relegates millions

of American public workers to second class political status, nor does he in his article betray any sensitivity to the clear and present implications that his proposal will also divest the employees of their economic and trade union rights. "By pretending that these firms are really private . . . we leave them free to engage in a good deal of [he might have added *union*] activity . . . by men who . . . are public employees." As read by the unionized employees of Lockheed, Galbraith calls for the reduction of their political and economic rights, and thus assures the opposition of their union to any such plank in the Democratic platform. A rational, socially useful suggestion is doomed, partly at least because practically all of us, including Galbraith, accept as revealed truth the doctrine that public employment is "different."

Recent efforts to alter the public character of the Federal postal service have to some extent played on the very fears described in the foregoing, but with a reverse twist. Advocates of a postal corporation had hinted to postal employee unions that certain, if not all, of the trade union rights of private workers might be available if the postal service were converted to corporate status. Not the right to strike, of course, but, perhaps the right to bargain for the union shop? The postal organizations were indeed tempted by the prospect of union security contracts. The union shop and the agency shop, as well as the right to strike, are not presently being considered for Federal employees. Yet, in testimony given before a House Committee, Postmaster General Winton M. Blount said that under a postal corporation, union and management should have the right to negotiate a union shop contract. After all, he might have added, employees of the Bell System, Western Union and Railway Express, all postal service competitors, are protected in their labor rights (including the right to strike). Why not the Postal Corporation, at least in the area of union security?

Why do some unions composed entirely of public employees appear to be generally satisfied with a system of "separate but equal" rights? If there is near unanimity among Americans that public employment *is* different, then we should not be surprised that many public employees also share this view, or that their unions are content to fight for separate legislation. Perhaps we should seek additional answers, to ask the question: Are there hidden values in separation that attract public workers and their unions? If so, what are they, and do they really justify the retention of a segregated system?

We have been warned that the "gap" in our labor law system "permits the public to be savagely victimized by ruthless labor barons. . . ." The Scripps-Howard logic seemed to run this way: "If the National Labor Relations Board had jurisdiction, the New York City transit strike could have been enjoined for eighty days, and during this cooling-off

period a fact-finding panel would surely have helped the parties to find peaceful solutions." Rational enough; but implied is an otherwise total absence of legal restraint upon the power of the "ruthless labor barons." New York State, however, had taken precautions to protect the public interest against the effects of such strikes. Twenty years earlier, in 1947, the Condon-Wadlin Act was passed, prohibiting strikes by public employees anywhere in the State of New York. Loss of job and reinstatement rights was the basic penalty. The Governor, a few months prior to the illegal transit stoppage, defended the state statute as an effective deterrent against impairment of vital public services. However, the law was not invoked during the transit strike. When the strike finally ended, the governor asked the legislature to enact special legislation exempting the striking workers from the "deterring" penalties of the no-strike law which the workers had clearly violated. The legislature complied. In effect, then, a gap has been created, both in substance and credibility.

It has been said that law which fails to command general respect, indeed that is often the object of contempt, is worse than no law at all. For one such piece of legislation saps the entire legal system of strength and stature. Clearly, no-strike laws do not deter strikes; if anything, they incite them. Such laws are inconsistently applied, and tend to encourage irresponsibility among those against whom the laws are ostensibly directed.

Repression, discrimination, segregation produce responses that run the gamut from the defiant to the devious. Public strikes, because they are illegal, seem somehow to "happen." Unlike the industrial model which is thoroughly structured on both sides, the public employee stoppage often comes unannounced, follows no set rules, has no concept of duration attached to it, and is guerrilla in its tactics. Because judges stand ready to grant total injunctions in advance of a stoppage, the plan of attack usually involves the element of surprise. The "event" is called a "sick day," or "Blue flu," or a "study day," and is designed to harass as it also circumvents the strictures of no-strike statutes. The net effect is to mitigate the employee's income loss and the threat to his job security. Because repressive laws are virtually unworkable (how do you fire and replace one thousand or ten thousand garbagemen?) public management finds itself rationalizing its failure to invoke the penalties of the law by joining in the charade which defines the "event" as something other than a "strike." Workers participating in such an "action" or "event" have been known to receive pay for their time off the job because the employer insisted that his employees were *not* in violation of the no-strike law, and that therefore neither was he in violation for refusing to invoke the penalties of the law. Where an event is billed informally as a "sick day," workers honoring the sick call have claimed

and received sick pay for the day or days away from the job. Where picket lines are thrown up, sometimes manned by off-duty employees, those who have honored the line have on occasion been paid on the plea that they feared to cross the picket line. This latter phenomenon suggests that the union need only place a lone picket (who may or may not be an employee of the affected agency) at the entrance, arrange for all others to call in their assorted fears and thus get paid for the day, while also assuring a profitable and successful "event." Garbagemen, teachers and others who work on the task system, recognize that time lost in a work stoppage probably will be made up, and with it lost income suffered by the employees. In fact, sanitationmen, for example, can expect to work considerable overtime—perhaps at premium overtime rates.

It appears that repressive no-strike laws establish a permissive atmosphere of creative evasion in which the fear of income and job loss is minimized, and in which the employer indeed sometimes actively colludes. In the process, the dignity and at least the small sense of sacrifice that should attend a conscious act of civil disobedience, are lacking. What's more, the heavy responsibility implicit in the structured strike is also avoided.

Paradoxically, one may argue that the unfettered right to strike is in itself a greater strike deterrent than laws that prohibit strikes. Where the union is secure and legally protected in its right to strike, the employer, aware of his own power to influence the strike decision, can be expected to exercise great sensitivity toward the bargaining process. Analogous is the confrontation of two strong powers in international relations, each aware of and restrained by the capability of the other. No-strike laws, on the other hand, tend to make the employer dull to the danger signals, thus enhancing the likelihood of a bargaining breakdown. Aside from the influence of the other party, there are internal compulsions at work among union members that markedly affect the strike decision. Except for the rare national emergency strike which may be arbitrarily halted through National Labor Relations Board or Railway Labor Act injunction, stoppages in private industry are understood by the parties to end when voluntary agreement is reached. In this setting, both sides face a strike situation fully aware that the strength of each is to be put to the test. The workers know that they will make two critical decisions: they will vote to begin the strike and they will vote to end it. In the interim, for as long as the strike lasts, the workers' income will suffer and the employer's ability to produce or provide service will be curtailed. But, the strike will end when the workers and the employer voluntarily come to terms. It will not end because a law says it must terminate, or because a politician screams "treason," or because a judge bans all picketing, or because the press demands a return to work. Exclusive responsibility rests with

the workers and their employer. Nobody takes the parties off the "hook," not even the Federal mediator. By definition, it's for the duration. Uncertainty of the "duration" is the factor that weighs heavily in the deadly serious business of conducting a strike.

The decision to strike must then be a personally responsible one, for the responsibility of ending the strike will not be assigned elsewhere. It remains where it began—with the worker. If this is so, is it not reasonable to assume that the unrestricted right to strike carries as a corollary the restraining influence of personal responsibility for the consequences and for subsequent decisions? And is this not a healthier situation, for the individual and for society, than that in which the restricted right induces an aura of personal irresponsibility?

The circumstances surrounding the celebrated "study day" of Montreal police last October 7 make for an excellent case in point. Canadian law prohibits strikes by police and firefighters. There are no automatic penalties, however, in the event of illegal strike. The pattern where strikes are banned is familiar enough. In the summer of 1967 Montreal police accepted a less than satisfactory wage settlement on the mayor's plea that the city's Expo '67 not be jeopardized, and on the promise that adequate reward would be forthcoming. That contract left Montreal police, a well-trained and necessarily bi-lingual force, almost $2000 per year behind their Toronto colleagues. Montreal negotiations in 1969 led finally to a fact-finding recommendation in early October that would raise the Montreal average to $8480 annually, still significantly to the rear of Toronto. A mass meeting to "study" the award was called the morning of October 7, 1969. The Mayor of Montreal, confident that the fact-finder's award would be accepted, happened to be in St. Louis, Missouri, on a trade mission. At their meeting, the policemen voted to immediately go into an extended "study session." Instructive here is an interview with one of the "students" who, according to Gerald Clark's account in the *New York Times Magazine* of November 16, 1969, ". . . reminiscing later said he was hoping the decision to settle . . . would be taken from him. He was sure . . . the government would compel the strikers to go back to work, or that prominent industrialists would persuade municipal authorities to offer improvement." In his article, "When The Police Strike," Clark reports that the Quebec legislature did quickly threaten fines and loss of union recognition, and the "study session" ended by overwhelming vote just seventeen hours after it began. Bargaining resumed, and two weeks later accord was reached on a new contract that increased annual pay to $8750. The pact was hailed by union spokesmen as at last providing parity with Toronto. But, it was stimulated by a 17-hour work stoppage by policemen who had no legal right to strike. Questions must be asked: Would the acknowledged

right to strike in this admittedly crucial case have in fact assured the same result without the need for the strike to take place? Granted the right to strike, would the mayor have been out of the country at so sensitive a moment in collective bargaining as when the fact-finder's wage award is to be announced? Would the police, without warning, have taken the desperate step as they did? Would the recognized right to strike have assured a heightened sense of responsibility on both sides?

It may very well devolve upon unsophisticated, inept public employers to finally destroy our dual, segregated systems of labor relations. Peculiarly, while other democratic nations debate the desirability of converting private enterprise to public, our tendency except for sick transit seems to run in the opposite direction. Public employers, hemmed in by civil service, frustrated by supervisory problems, buffeted by community pressures, pulled by politicians, pushed by public employee unions, restricted by non-existent or unworkable labor relations statutes, often seek to run away from their problems rather than try to solve them. A "runaway shop" is one thing; who ever heard of a "runaway government"?

In desperation some public employers have thrown up their hands, thrown in the towel, and have sought simply to turn over public services to private enterprise. Notwithstanding Lincoln Steffens' admonition about public enterprise and private greed, many cities do contract out their garbage disposal; schools and universities and hospitals contract their food services and custodial work. Indeed, the City of New York has turned over its hospitals, patients and all, to private operators. We know of the measure to convert the Postal Service into a postal corporation. In some instances, dual public-private systems of labor relations co-exist side by side, graphically posing our problem. To illustrate, two employees at Ohio State University perform precisely the same custodial work, but in adjacent buildings. One is a public employee hired by the university; the other is employed by a private contractor. The private employee belongs to a union, the Service Employees International Union, which is certified by the National Labor Relations Board as the exclusive bargaining agent for all employees of the contractor. That union, and the employee, are free to strike and to negotiate a union shop contract. The public employee may, if he chooses, belong to the American Federation of State, County and Municipal Employees, which is recognized by the University but only indirectly as the bargaining agent. There is no unit and no union shop; and of course the right to strike is prohibited. The public employee is covered by an "Understanding" reached by AFSCME and the University and verified by an exchange of signed letters. The private employee is covered by a legally enforceable contract. This public employer is doing through an agent—the private contractor—what he insists he may not do as public employer.

Having divested himself of labor problems by the simple expedient of

making them private, the public employer no longer need be concerned with such irritants as the right of public employees to strike, their right to union security and their right to contract. Inasmuch as private employees do enjoy these rights, uncomplicated by the fantasy world that surrounds public employment, perhaps the answer is to convert all public services into private enterprise. After all, there are private teachers, private police, private utilities, private bus drivers, private garbagemen, private fire fighters, even a mercenary military. "Why not," one asks, "throw out the public baby with the dirty bathwater?"

On the other hand, someone may simply suggest that the sovereign divest himself, not of responsibility, but of the myth, tradition and frustration; that he step down from the throne clad in modern dress, prepared to adapt himself to the contemporary needs of public management, and like his private counterpart, in fact proceed to manage.

It is in the best interests of public management, of public employees and their unions, and of the general public that a rational, responsible, unified labor law system be established.

Yet, in the United States, we religiously insist upon segregated, less than equal systems of regulating labor relations in the public service in those states that have thus far acted in this field, and in the Federal service. The Kennedy Executive Order No. 10988, modified on October 29, 1969, has not yet been elevated to law. It prescribes the bargaining rights and responsibilities of Federal workers and management, but limits severely the scope of action of the parties. Understandably, inasmuch as it bears the signature of the employer, the Executive Order bans the strike and union security. Among the states, only Hawaii and Pennsylvania have now taken the step to legitimize the strike in public service through enactment of a statute dealing specifically with public employees.

Ten more states—Connecticut, Deleware, Massachusetts, Michigan, New York, Oregon, Rhode Island, Vermont, Washington and Wisconsin—have mandatory bargaining laws exclusively for state and/or local government employees. Three others—Alaska, Missouri, and New Hampshire—permit collective bargaining, but impose no penalties for refusal to grant recognition or for failure to bargain in good faith. California and Minnesota simply allow the parties to "meet and confer." Other states have not acted in the public employee field at all, or have adopted only minor legislation dealing with the right to join a union and to present grievances. Thirty states have enacted some legislation in this area. In a few states, the laws affecting public employees are similar to those covering labor relations in the intrastate private sector; but, in none are public employees included for coverage purposes under laws dealing with private workers.

The prescription to apply liberal (or perhaps conservative) doses of

the national labor law to public employee labor relations may have been motivated by the same negative considerations which for so many years resulted in exclusion and segregation for public workers. But, unionization having taken place despite exclusion, some candidly call for National Labor Relations Board application now if only to control the "excesses of the labor bosses" in the public service. The net result, quite apart from motivation, does demand sober study. Why not extend the jurisdiction of the National Labor Relations Board to all state and local employment?

We can dispose quickly of the constitutional question and move on to the merits of the argument. The U.S. Supreme Court in *Maryland v. Wirtz*,[2] held in June, 1968 that the Congress has the authority to extend the provisions of the Fair Labor Standards Act to state and local government functions. Public enterprise, if Congress so determines, may be construed according to the same criteria as apply to private enterprise. If this be so, the legal argument against extension of the National Labor Relations Board is demolished.

Historically, the Federal government has involved itself in state and local labor matters by means other than mandatory legislation. There is a considerable body of precedent in this regard, most of it accumulated by way of the "grant-in-aid" device. Prior to the Fair Labor Standards case, federal personnel standards were imposed on state and local governments as a direct condition of financial grants by the Federal Government. The Hatch Act restricts and sets standards for the political activity of Federal employees. These standards automatically apply also to employees at the state and local level whose duties are in connection with an activity financed in whole or in part by Federal loans or grants. True, as in all grant programs, the state agency need not accept Federal funds and thereby choose to escape the personnel regulation. But, the facts of finance being what they are, it is indeed a rare unit of government that today will rise above interest to safeguard the principle. State employees whose performance involves employment services, mental health or welfare programs must be recruited and retained on the basis of merit if the state is to share in Federal funding of these services. In addition, Federal qualifications and job content standards must in certain instances, as for Social Workers, be met. Permissive legislation has been adopted by the Congress which, if applied by the states, would extend such benefits as Social Security and unemployment compensation to state and local employees. Until the recent FLSA case, it was assumed that the Congress could legislate for state and local employees only on a permissive basis, and then through the state government exclusively. But, there had been hints prior to the FLSA case that Congress was prepared to chisel away

[2] 392 U.S. 183 (1968).

at the state's rights barrier. Congress, in the Civil Rights and the Economic Opportunity Acts of 1964, covered under the former the clearly intrastate "greasy spoon" restaurant, and via the latter had carved out a grant-in-aid short-cut to the cities that bypassed the state governments. Although the states have won back politically their position in the anti-poverty program, the right of Congress to deal directly with the cities has not been constitutionally upset.

The Federal incursion into state and local government has been characterized by a concern for nationwide standards that are intelligible and uniform. Typically, the power of the Federal purse has been the lever in inducing, sometimes seducing, the cooperation of state and local government. This has certainly been the case where employment standards were sought. Fourth of July devotion to civil service merit notwithstanding, most states would not have emerged, even to a limited extent, from the patronage system which "made their parties great," if not for essential standards imposed by the Federal Government. A basic uniformity in state standards is generally thought to be desirable; and if this be so in personnel matters, then we should examine carefully the avenues feasible and desirable for effectuating uniformity in standards governing labor-management relations in the public service.

The grant-in-aid technique has been extensively used in applying the Hatch Act and the merit system. Do we have available to us a Federal formula for labor relations that may be similarly imposed as a useful condition for Federal grants and loans? Federal employee labor relations are governed by Executive Order 10988 as initially authorized in 1962 by John F. Kennedy and amended in 1969 by President Nixon. The Congress could be urged to require as a condition of all future grants that the grant recipient agree to apply the Executive Order on labor relations to the recipient's own labor-management problems. This may be unrealistic inasmuch as Congress has thus far failed to enact a Federal employee labor relations law, choosing to leave the matter in the hands of the Chief Executive. Further, the machinery created by the Executive for designating bargaining units, conducting elections, and resolving impasses is entirely inadequate to cope with the demands that would be exerted from the much more numerous state and local services. The Federal Civil Service Commission does handle non-Federal violations of the Hatch Act; but, the problems of labor relations are far more intricate. However, within the Federal establishment there are other administrative devices that might be useful if tied in with the grant-in-aid. The Federal Mediation and Conciliation Service, designed to ease if not entirely head off collisions in the private sector, is regionally structured and thus could be available in labor disputes in state and local employment. The Service does not have authority at present to enter a public dispute of its

own volition, nor may it become involved if only one party to the public conflict makes the request. By administrative order, Federal mediators do enter public labor disputes if both sides request assistance. The law is silent on the subject. Unfortunately the public bargaining process does not normally anticipate the constructive use of Federal mediation. For example, the private sector requirement of formal notice to Federal mediation when bargaining reaches a crucial stage does not apply to public bargaining. Thus, proposals for Federal mediation in public bargaining usually come at the moment of crisis when the parties are so sensitive and so hardened in their positions that neither is inclined to show the weakness that may be associated with even the slightest favorable nod in the direction of third-party aid. Conceivably, a grant-in-aid condition could be the insistence that state and local government take the initiative in seeking Federal mediation involvement whenever a strike (or whatever it is called) is threatened, or that public management attempt to include in labor agreements (or whatever they are called) the automatic and joint request for Federal mediation when bargaining reaches a previously specified date, for example, thirty days prior to contract termination. These, of course, are last moment, fire-brigade devices, and although obviously important in the broad bargaining range, do not at all guarantee the basic preventive techniques without which sane labor relations are difficult if not impossible. On the assumption that we do seek orderly, peaceful and equitable labor relations in public employment, it seems necessary that we look beyond the grant-in-aid device to achieve our goal. In now pursuing the question of direct application of the National Labor Relations Board to state and local labor relations, we ought to determine whether the states under any circumstances are capable of fulfilling the required functions.

Implicit in the passage of the National Labor Relations Act in 1935 was the notion that the economy of the nation transcended state lines, that workers merited protection of their basic rights whether they toiled in Mississippi or Michigan, and that uniform standards of labor relations were desirable. Narrow definitions at the time served to exclude millions of wage-earners, without however prejudicing the principle implied in the Act. Thirty-five years have gone by, and a minority of states have set up their own labor relations machinery for public employees, all within the past ten years. They variously provide for an administrative board, composed of appointees of the governor, with varying authority to establish rules covering bargaining units and exclusions, election and certification of bargaining agents, unfair labor practices, and methods of resolving disputes. These state statutes, with two exceptions, ban the strike and impose varying penalties on worker, union and union officer for viola-

tion of the no-strike prohibition. The statutes and/or administrative rules may also circumscribe the area that is deemed negotiable.

If uniformity is indeed desirable, what has been the experience among the states? Have they in fact sought to adhere to a standard labor relations structure as comprehensive statutes are considered, or is the tendency separatist and confusing—or even innovative? Justice Holmes contended that the states are our social laboratories, that novel ideas can be tested first in one state and then in others before general acceptance permits of national application. This has been true in legislation affecting minimum wages and maximum hours of work, of unemployment compensation, and of the labor of women and children. When the Commonwealth of Massachusetts in 1842 enacted a statute prohibiting children under the age of twelve from working more than ten hours a day, it marked the beginning in the United States of such state experiments that culminated almost a century later in the Federal Fair Labor Standards Act of 1938. Federal action undoubtedly would have occurred much earlier if not for adverse rulings by the U.S. Supreme Court. The Owen-Keating Act of 1916, which forbade interstate shipment of goods on which children under fourteen had worked, was voided in 1918 by a 5-4 vote of the Court. It was not until 1941 that the Supreme Court finally upheld the right of the Congress to act in this field. It should be noted here that the American Federation of Labor, although it consistently supported state action, until 1933 opposed Federal action regarding such matters as hours of work and unemployment compensation. Franklin Roosevelt's New Deal softened the suspicion that characterized organized labor's earlier attitude toward the Federal Government. The intransigence of the courts and the reluctance of labor served to inhibit the early passage of Federal legislation, and the reaction of private employers was of course negative. But the states, too, tended to perform in ambiguous fashion in this field. Very few states served as "social laboratories;" most were content to keep private enterprise happy within their state boundaries. Most states in order to seduce and placate industry, failed to legislate in behalf of the social welfare of their own citizens, and also worked hard to prevent the Federal Government from filling the gap left by their own dereliction. The Congress finally, and as a last resort, acted precisely because most states, resting complacently on their respective sovereignties, neglected their obligations. Squeals of anguish emanating from assorted state houses about "state's rights" do not erase the fact that "state's responsibilities" have been grossly ignored.

In the matter of public employee labor relations, it appears that the overwhelming majority of states, despite the admonitions of the 1967 National Governors Conference, will continue to default. The handful that previously showed experimental zeal seem now to be locked in a

self-defeating contest to determine which can construct the most ingenious set of repressive penalties against strikes. The state laboratories are now engaged in the creation of monsters. One of the more renowned scientists, Dr. Taylor, the father of the New York State Frankenstein, has now publicly renounced his own offspring. Competition among the states has deteriorated to the point that in the public labor relations field production is now confined to hybrid beasts which bear less and less similarity to each other. Still less do those state products conform to a desirable standard.

For example, assume that we are considering the "private-public" status of transit systems in Cincinnati, Ohio; Miami, Florida; and New York City, New York. For our purposes, all three are currently operated through private franchise. Each has an exclusive bargaining agent certified for a specified unit as the result of a secret ballot election conducted by the National Labor Relations Board. A contract exists in each jurisdiction which provides for binding arbitration of grievances and contains a no-strike clause for the life of the Agreement. The right to strike is protected by national law and may be asserted at contract termination. The three systems are now returned to the city or other appropriate political sub-division. Let's see what happens.

The Cincinnati transit operation, now public, may or may not, depending upon its exact municipal status, be subject to all or some state laws affecting public employees. The Ohio Supreme Court in recent years has ruled that charter cities such as Cincinnati are governed by the constitution of the state and by the charter of the city. State law does not necessarily take precedence. However, in *Hagermann v. Dayton*,[3] decided by the Ohio Supreme Court in 1947, it was held that unions had no legitimacy in the civil service. The home rule city of Cincinnati, with virtually no guidelines to follow, has in fact established by ordinance a policy of union recognition and collective bargaining. Without question, upon becoming public the employees are automatically deprived of their right to strike. Further, the city of Cincinnati would not approve of a union security clause that requires union membership or the payment of a service fee as a condition of employment. That would have to go. Also, Cincinnati does not accept the principle of final and binding arbitration of grievances, nor does it consider its collective bargaining documents to be legally enforceable contracts. But, the city's intentions are honorable; good faith is the order of the day. The "contract," now encased in quotes, and of course modified as required, will limp on. The union has retained its exclusive bargaining rights, at least for the time being. As termination date nears, assume that the mechanics employed by the transit system sign up with the mythical Independent Order of Master Machinists. The IOMM seeks recognition for a mechanics' unit.

[3] 147 Ohio St. 313, 71 N.E.2d 246 (1947).

Unfortunately, the city has no rules or machinery to resolve disputes over the scope of a bargaining unit, over subsequent modifications of the unit, over the validity of majority claims, over unfair practices and over the impasse in negotiations. But the mechanics are threatening to walk out if their unit is denied. How and by whom will the decision to sever or not to sever be made? Will an ad hoc third party, as in arbitration, be hastily summoned? If this is contemplated, must all principals in the dispute agree to the identity of the impartial judge? We have only two labor organizations and the employer in this case. It could be worse. Assuming that the third party method is somehow implemented, what is the likelihood of continuity in the future disposition of similar cases?

Bargaining finally begins with the union that formerly held contract rights. The union leadership is especially truculent because of the suspicion that the city aided the "rump" organization which sought to divide the unit. No unfair labor practice charge was filed against the employer because there is no processing machinery available. Irritated, the management committee storms out of the negotiating session. Again, no agency exists to require that the parties bargain in good faith. If an impasse is reached in the bargaining process, help can be sought from the Federal Mediation Service only if the parties mutually request it. Neither the State of Ohio nor the City of Cincinnati is capable of providing mediation machinery. Even if the City could, should a theoretically impartial mediating agent appointed by the mayor, who is ultimately the employer, be acceptable to the union?

The Cincinnati case is current. There exists much sentiment among public officials, and within the union, favoring public ownership. But, the union will not support a public takeover unless assured adequate safeguards. In anticipation, the union sent lobbyists to the state legislature in January, 1969 in behalf of a bill that would guarantee retention of trade union rights in the event the Cincinnati Transit System were to go public. The bill was buried in committee because the state legislative and administrative leadership wanted no legislation at all on the subject of public employee labor relations. Finally, more than one year later, the Ohio General Assembly enacted a statute which required a public authority to assume all the employer's obligations under any existing labor contract, and further preserved rights, benefits and privileges under existing collective bargaining agreements. Otherwise, Ohio law on this vital subject continues to sum up in the *non sequitur*: Under no circumstances may Ohio public employees strike; they have only a questionable right to join unions; they may have their union dues deducted from the payroll by the public employer.

The Miami-Dade County transit system, prior to going public, was organized by the Amalgamated Transit Union. Protected by the National

Labor Relations Board, the union succeeded in negotiating a contract which of course asserted the right to strike. Florida's "right to work" law prohibited a union shop clause in the contract. Dade County took over the system, and the workers became county employees. Under Florida law all public employees have the right to union membership, may present proposals to their public employers, but may not strike. Oddly enough, among county employees in Florida only Fire Department employees are legally entitled to collective bargaining. Others, including the now publicly employed bus drivers, are only permitted to do so. The Transit Union, jarred by this combination of legal blows, was literally counted out by a ruling which prohibited public employers from granting recognition to any organization whose constitution, local or national, did not renounce the right to strike. An independent, perhaps more compliant, association today represents the Dade County transit employees.

In New York City transit is largely publicly owned. Public transit workers are denied the right to strike, while their private counterparts are of course protected in that right. Unlike Ohio and Florida, New York is one of the few states to have experimented with comprehensive legislation. Thus, there exists machinery to facilitate the establishment of units, to certify bargaining agents, to aid in the settlement of disputes, and to penalize strikes and strikers. New York City has its own office of Collective Bargaining which antedates the state statute. The New York transit situation differs from the examples previously cited in that the New York City union continues to have its rights protected, except for the right to strike. Although this is an all-important deprivation, it does not add testimony at this juncture to the fact of non-uniformity of conditions among the states. On the contrary, if there is consistency at all, it is in this ubiquitous stricture against the strike.

It is important, because it provides graphic witness to the untenability of our labor policies, to examine as has been done here the "transvestite" enterprise—one that readily sheds its private for public garb, and vice versa. But, it would be unwise to assume that problems exist only at the edges that tentatively and nervously separate the public and private sectors of our economy. Public employment is too big a factor in its own right to be without influence on the general labor scene. In a democracy any system of rules and values that arbitrarily excludes fifteen percent of its potential participants must be injured to an important degree. Ever increasing mobility among workers that carries them into and out of the excluded public category surely has the effect of confusing the authority of rules imposed in both the majority and minority areas. As the public sector inevitably grows in relation to the whole labor force, and its workers continue to organize with or without the sanction of law, we run the risk of eventually developing two competing bodies of administrative law

dealing with essentially the same labor relations problems. One of course is based on National Labor Relations Board doctrine. The other threatens to be a patchwork composed of the rulings of agencies created by some states, but much more often of *ad hoc* decisions by third parties selected at random crisis points, the rulings of judges in specific common law situations, and the opinions of attorneys-general, and based on all of these a topsy-like spate of arbitration cases already characterized conveniently as "cases in public employment." Parkinson will have prevailed when the American Arbitration Association sets up separate panels for public employee cases. We are farther along than many realize in the piece-meal growth of this boot-leg, other-world of labor relations. Some states may have legitimized themselves by enacting mandatory or permissive bargaining laws; but this does not take into account the vast number of political subdivisions in all states which, subjected to labor pressures, adopted some form of collective bargaining system despite the absence of state law. The combinations of form and substance in public labor relations in such states are as a result already extremely complex. For those states that have not yet preempted the field, it may indeed be too much to expect that they now act. A state like Ohio, with no experience in coping impartially with labor-management relations, public or private, must by now be overwhelmed by the prospect of creating elaborate machinery designed to regulate its public labor problems. Despite the fact that public employees in Ohio do not have the legal authorization to organize and bargain collectively, thousands upon thousands at all levels of government *do* belong to labor organizations which *do* bargain collectively in their behalf. Signed agreements, known by whatever euphemism, exist in the state, county, municipal and school services. Frequently there are no limitations imposed on the breadth of the bargaining unit or on the level of supervision eligible for union membership and/or coverage under an agreement. The agency shop has been negotiated in a few jurisdictions. Union security through twelve months' check-off authorization is becoming popular. Exclusive bargaining rights have been granted directly or indirectly by state, county and local agencies. The options seem to vary consistently with the number of jurisdictions involved. "State law—who needs it?", some ask. Perhaps a state law is not needed, but uniformity surely is.

The American Arbitration Association has rushed into the breach, offering its Center for Disputes Settlement as a means of resolving public employee problems in the states where no legal machinery exists. Noting that some "thirty-seven states" are without bargaining laws, Center Director Willoughby Abner told the Federal Bar Association in May, 1969, that "it isn't our intention to compete with existing agencies provided for by law." Abner stated that the Center is prepared to determine appropri-

ate bargaining units, conduct representation elections, mediate impasses and provide arbitrators in grievance cases. If the Center were equipped to handle the labor problems of thirty-seven states, and if a thousand pragmatic precedents were not already set in those states mainly because they lack law, one could almost with equanimity anticipate a measure of success for the Center in bringing reason and uniformity to the labor relations of a substantial segment of the public sector. Unfortunately, the Center has neither the means, the manpower nor the mandate to accomplish its task.

It is arguable, in the interests of impartiality, that Center machinery should be preferred to the third party involvement of a state or municipal agency. Some cities, particularly where the state is without a general labor relations agency, have established their own labor-management committees. These are usually composed of equal numbers representing labor, management and the public, and are normally appointed by the mayor. The function of the committee is the same as outlined above for the Center for Disputes Settlement, but has historically been intended to handle disputes in the private sector, especially those outside the purview of federal law. Hotel disputes were early targets of such local committees. When public workers, including even those employed by the city, began to organize, municipalities that had labor-management committees tended to use the committees as the means of heading off conflict. Even though the mayor was the employer and the man responsible for appointing the members of the committee, labor members of the committee often prevailed upon the public employee union to accept the committee as an "impartial" third party. Organized labor understandably accepts the role of the mayor, the governor or the president as the logical official to appoint members of the boards that are responsible for administering labor relations agencies. The top public officials at the three levels of government are not viewed by labor generally in their capacity as employers of workers. Thus, where the National Labor Relations Board would qualify as an impartial body for labor relations in state and local government, its role in matters involving federal employees might be suspect, since National Labor Relations Board members are appointed by the President. Similarly, a board appointed by the governor of a state should perhaps be considered inappropriate where employees of the state and of its political subdivisions are affected.

Admittedly, objectivity and impartiality are impossible in public affairs. If they were, by now the computerists would have taken hold and relieved us mortals of the anguish of decision-making in labor relations. The best we can accomplish is to strive for fairness, to insert the "disinterested" third party between the contending factions, and to do the utmost in assuring a sense of general confidence in the role of the medi-

ator and in the institution represented by him. This confidence should be shared not only by the parties at conflict, but by the public. By definition, then, we should reject out of hand the concept of mediation which presumes sole selection directly or indirectly by one of the parties. A labor relations board appointed by the public employer has no greater right to claim impartiality in disputes that involve that public employer than a similar board appointed by the president of General Electric in a labor matter involving GE. An employer is an employer is an employer. . . . Ameliorative, but not especially impressive, is the practice of appointing members of state labor boards to terms that exceed those of the appointing governor, with the proviso that members may be removed only for cause. These suggest greater independence for board members; but, unfortunately the ability or the willingness of board members to withstand the pressures of the man who appointed them is always suspect. The temptation of a governor to assume certain responses from his appointees must be a constant consideration for all involved parties. Even if the governor is not so tempted, the fact that others think he is simply by virtue of his appointing authority, suffices to damage the integrity of the third party function.

A governor, acting in the role of employer, can be expected because of political considerations to flirt even more than his private counterpart at the edges of impropriety in the very sensitive business of labor relations. For example, if given a choice, any employer, private or public, can be expected to prefer a more docile rather than a militant labor organization as the bargaining agent for his employees. Private employers have learned after years of experience with a tough task-master, the National Labor Relations Board, to studiously avoid this kind of unfair labor practice. A governor, having only to contend with his own board, may as perhaps happened in 1969 in New York State, extend a helping hand to a favored organization. Further, unlike private employment, a particular labor union might have given major support to the governor in his campaign for election, while another backed the loser or simply sat out the contest. There are strong hints that state board decisions regarding unit determination and recognition in certain states have been issued in terms of reward for the governor's friends and punishment for his enemies. Provable or not, such allegations are common and more important are believed. Suspicion will persist as long as the public employer has the power to unilaterally select the "impartial" agency.

State legislators, who may have authority to confirm appointments of labor board members, and who without question control the agency's appropriation, can be expected to try to influence the public employee labor board as the board deals with public agencies within the legislator's district. Given the poor quality and ethical laxity that abound in our

state legislatures, and the political if not other forms of susceptibility of state administrators, the state labor board suffers serious built-in handicaps. Of course, if the National Labor Relations Board were applied to state and local employment, Congressmen could show the same kind of interest in their districts as I suggest the state legislator evinces. However, the Congressman is literally more distant from issues of this kind, his interests are usually more diverse, and in any event his ability to influence the National Labor Relations Board is negligible. National Labor Relations Board rulings in specific cases regarding unit recognition, elections, and certification are not known to be subject to political tampering. The fact that neither the public employer within the state nor the public employee union has a hand in the appointment of National Labor Relations Board members provides a setting in which both may have confidence and in which it is conceivable that a balance may be struck among the rights of worker, employer and public.

Equity and the balancing of rights are the concern of our national labor law, indeed of any law. In labor relations the principle applies equally to private and public circumstances. As we know, a dispute between private parties may have a far more devastating impact on the public interest than an altercation between public employer and public employees. The question for us centers then on the capacity of present national law to resolve labor-management disputes without unfairly jeopardizing the essential rights of workers, employer or public. Unless modified, all references here will be uniformly to private *and public* labor-management relationships, on the assumption that the national labor law should be extended to labor relations in state and local government.

Equity and balance can best be served first with the requirement that National Labor Relations Board and Federal Mediation machinery shall be available only where the parties agree to contract clauses providing for no-strike, no lock-out, and binding arbitration of all grievances that arise during the life of the contract. The Federal Government, just as it now provides free mediation service, should pay for the costs of grievance arbitration. This would reduce if not eliminate jurisdictional and grievance stoppages, and repair the imbalance that exists in certain major instances. The General Electric Company, for example, insists that certain grievances shall not be arbitrated and are therefore subject to settlement by strike. Ironically, the thirteen unions that struck General Electric in the fall of 1969 were able to do so simultaneously despite the fact that their contracts terminated on varying dates. Some simply struck over unresolved grievances, and there were plenty of these. To further reinforce the basic security of parties to collective bargaining, that is as long as the law requires the certified agent to represent equally all employees in the unit, the individual states should not be allowed to

modify the national law in any respect, including the vital area of union security. If we are to effectively cope with the public interest dispute, it is essential that we first take steps to assure the survival of strong, secure components in the collective bargaining arena. This is so important that perhaps we ought to go one step beyond the prohibition against state tampering with the labor relations machinery. It may be desirable, in the interests of stability and security, to restore the practice of submitting the question of the union shop to majority vote of employees in the bargaining unit. If the majority votes in the affirmative, then the certified union and management should be *compelled* to incorporate into their contract a provision requiring union membership as a condition of employment during the life of the contract. Thus, the majority union would be required throughout the contract term, to abide by a no-strike declaration as it represents equally all employees in the unit; the company would not be permitted to lock-out its employees over any issue that should arise during the agreement period; both must accept the award of an impartial arbitrator in all unresolved grievances that occur during the life of the contract; and all employees in the bargaining unit must join and remain members of the union for the duration of the stipulated contract period. Government, for its part, agrees that during the life of the contract, it will make available to the parties all of its impartial, problem-solving, peace-keeping machinery free of charge, including arbitration and mediation services.

The union shop election was instituted as the result of the 1947 Taft-Hartley amendments to the National Labor Relations Act. Before the negotiating parties could legally agree to include such a security clause in the contract, a majority of employees had to vote in favor in a special balloting separate from the original certification election. The special election was deleted from the Act when the record indicated overwhelming approval of the union shop in election after election. I propose here that the union shop be required, not simply permitted, where a union has been designated by the workers for this purpose. In cases of conscientious objection to membership, an auxiliary system of service fees rather than dues—the agency shop—could be used. All employees, whether members or simple fee-payers, would be bound by the stipulated obligations for the life of the contract.

Certainly, for public employment, the prohibition against the strike and the lockout, and the insistence upon arbitration of grievances and use of mediation services should be acceptable. A hang-up would be the union shop or agency shop requirement. Can a public employee be legally or constitutionally compelled, as a condition of employment, to be a member of a labor organization or at least to pay a service fee to such organization? We know, of course, that public employees have been, in-

deed are today, separated from their jobs for failing to maintain membership in a *political* organization or for refusing to pay the "service fee" expected by the political organization. Membership by public employees in labor organizations has also been the subject of concern for some years. The following excerpts from court decisions deal with the question of union membership as a condition of employment:

> Our conclusion in this respect finds support also in numerous cases sustaining the validity of regulations prescribing, as a condition of public employment, certain restrictions upon rights. . . .[4]

> Whether a rational connection exists (regarding union membership and continued employment) is a matter of opinion. And the question was . . . for the Board . . . to determine.[5]

> If petitioner's activities had a tendency to create dissension and unrest among city employees . . . it is not for the courts to declare that a dismissal . . . would be without cause. . . .[6]

> [C]ourts may properly hold that there is a reasonable relationship between the integrity and efficiency of public service and union membership of public employees. . . .[7]

> One city may determine that union recognition results in efficient operation of its departments; another city may decide that public employees should have less rights than other citizens. In the present case the police commissioners and the union have, in effect, declared in advance under the collective bargaining agreement that union security is a reasonable requirement for the efficient and orderly administration of the police department. This is a decision they have a right to make. . . . Our conclusion (is) that this union shop clause, as construed, is valid. . . .[8]

The central question in each case was a rule regarding union membership as a condition of employment. Except for the final case cited, the requirement was that of *non*-membership in the union. In all cases, according to the courts, an individual's rights were not violated, nor was the merit system imperiled, by rules prohibiting or requiring union membership as a condition of employment. As the University of Cincinnati Law Review insists, and *Tremblay v. Berlin Police Union* reinforces: "[C]ourts may

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[4] Los Angeles v. Los Angeles Building and Construction Trades Council, 94 Cal. App. 2d 36, 48, 210 P.2d 305, 312 (1949).

[5] Perez v. Board of Police Commissioners of the City of Los Angeles. 78 Cal. App. 2d 638, 646, 178 P.2d 537, 543 (1947).

[6] Hayman v. City of Los Angeles, 17 Cal. App. 2d 674, 679, 62 P.2d 1047, 1049 (1936).

[7] M. Seasongood and R. L. Barrow, *Unionization of Public Employees*, 21 U. CIN. L. REV. 327, 346 (1952).

[8] Tremblay v. Berlin Police Union 237 A.2d 668 (Sup. Ct. New Hampshire, 1968).

properly hold that there is a reasonable relationship between the integrity and efficiency of public service and union membership. . . ."[9] Indeed, the merit, quality and efficiency of public service are likely to be enhanced by the requirement of union membership where the majority of workers have voted in favor of union representation. Management has learned that individuals who persist in "riding free" frequently cause dissension on the job, impairing efficiency. As a result, union membership as a condition of employment is commonplace today in private labor agreements. Ironically, public employees alone are subjected to truly unreasonable conditions of employment that are totally unrelated to efficiency or qualifications. Membership in the political "flower fund" is one such harsh example. Another is that public employees are often required to reside in the community by which they are employed as a condition of continued employment. Clearly, if the public employer may arbitrarily impose such an employment condition upon his workers, then he must possess both the legal and moral right to agree to a bilateral bargain that requires union membership as a condition of continued employment. I would repeat, however, that such condition should be imposed only as part of a contract that also, during its life, bans strikes and lockouts, and submits all unresolved grievances to binding arbitration.

Having hopefully overcome the union shop deterrent to National Labor Relations Board coverage for public employees, let us turn again to that thorniest, the most controversial of questions that plague the public service—the strike. If this "hang-up" could be resolved, the final obstacle to National Labor Relations Board extension would be removed, and rationality instead of sovereignty would reign at last.

It has been postulated that impasse during the life of a contract is to be reconciled by arbitration. What of impasse during contract negotiations? Because it is so broadly assumed that the strike must not be legalized in public employment, and because the National Labor Law so carefully assures the right of covered workers to strike, the logical conclusion has been exclusion of public employees from the National Labor Relations Law. This simple syllogism enjoys such wide acceptance within the labor movement that to propose inclusion for public employees implies to protected unionists the necessity of special modification of the law and thus the probable weakening of the basic statute as it relates to workers in private employment. Labor thus reacts negatively to such proposals for change. Yet, the bargaining breakdown does take place in private and public labor relations, and strikes of varying impact on the public interest do occur in both sectors.

In the vast majority of private collective bargaining situations, internal restraints at work on both parties and the routine availability of medi-

[9] M. Seasongood, *supra* note 6 at 346.

ation result in peaceful settlement of the contract. Of the estimated four percent that erupt into work stoppages, very few can be termed public interest strikes that are calculated to bring into play the emergency procedures of the National Labor Relations Act or the Railway Labor Act. We assume in the ordinary strike situation that although tension is heightened and unfriendly incidents may take place on the picket line, the result is also to speed up the bargaining process and assure rapid delivery of the product—a contract. The temporary dislocation and inconvenience to the public entailed in such stoppages, the frictions generated between the principals, should be and are absorbable by the very strong fabric which holds our democratic society together. Even the lengthy strike by major airlines in the spring of 1967 was bearable, one might say healthy, for the small minority of Americans who regularly use air traffic to get from one place to another. High-flying, fast, non-stop jets were grounded; but hedge-hopping, slow, puddle-jumper, prop-jobs were scheduled and available. The view from a few thousand feet is still, in this age of supersonic flight, very beautiful. If it takes a strike to help us retrieve images that have been lost because modern speeds and distance exceed the shutter and lens capability of our natural eye equipment, then someone may suggest that such a strike is indeed in the public interest. A kind of Malthusian balance may be involved here, the outlines of which are not fully discernible, and perhaps never should or will be.

But, certain strikes have been designated as sufficiently threatening to the public interest to warrant government intrusion under the Railway Labor Act or the National Labor Relations Act. The latter, as amended in 1947, gave to the President of the United States the power to declare a labor dispute an "emergency," to seek a Federal court injunction prohibiting such strike or lock-out for a period of eighty days, and to empanel a fact-finding board to report directly to the President on the facts of the dispute prior to the expiration of the eighty-day "cooling-off" period. The airline strike alluded to above was subject to similar, but not identical, procedures provided for in the Railway Labor Act of 1926. The President chose not to invoke the emergency authority, preferring to press informally on the conflicting parties the persuasive, although in this case not conclusive, authority of his office. In the case of the New York City transit tie-up a year earlier, neither the Railway Labor Act nor the National Labor Relations Act was applicable since the dispute involved municipal employment.

From 1950 through 1967, National Labor Relations Board eighty-day injunctions were sought in twenty cases. In one instance, injunctive relief was denied. Strikes were resumed or occurred following the "cooling-off" period on five occasions. These, however, were confined to the maritime industry. Even these, a recent report indicates, did not af-

fect the public interest. According to the *New York Times* of January 11, 1970, ". . . major strikes do far less . . . harm than generally feared. . . . A Labor Department study of longshore strikes in 1963, 1965, and 1969 had concluded that the strikes had no visible impact on the U.S. economy even though injunctions had been invoked on the grounds that the nation's health or safety was jeopardized. The strikes resumed when the eighty-day injunctions expired." Also significant is the fact that the federal injunctions were honored by the unions in every case since 1950. Although it has been urged that fact-finding panels appointed by the president be vested with the authority to make recommendations in order to hasten settlement, the record under the emergency powers section has been surprisingly effective. This is certainly so if contrast is made with dispute situations in which the federal labor law is not applicable. The labor-management battle ground in the public service, for example, is scarred where local court injunctions, promulgated in panic, actually ignited rather than soothed explosive situations. State and local restraining orders issued against public employee strikes are almost always eleventh-hour actions, drawn hastily and totally, and designed to ban all picketing and concerted activity. Because the injunction comes inevitably at the climactic moment, and is thus construed as a test of union virility, the order is often loudly and literally held in contempt. Instead of cooling off, as has been the case with National Labor Relations Board temporary orders, injunctions issued under repressive statutory and common law tend to exacerbate already inflamed feelings. And, as we have seen, disregard for the law, although contempt has carried penalties, has been at times ignored by public officials, and has even been rewarded. While federal court injunctions mandating an eighty-day cooling-off period have been uniformly adhered to by the parties at conflict, restraining orders in public employee disputes have been variously met with bitter resistance, including contempt and jail terms; with bitter resistance, excluding contempt; with bitterness and a return to work; with bitterness and no penalties against the strikers who have clearly violated the law; with bitterness and pay for time lost; with bitterness alone.

It would seem that if peace and justice are truly the goals of labor-management law, we would immediately recognize the efficacy of a uniformly and universally applicable federal system available in all dispute situations, private or public. We should want to extend a relatively successful procedure embodied in the National Labor Relations Act to the public area. State laws that ban strikes by public employees have generally failed to achieve either peace or justice. Where repressive law imposes peace, it usually disposes of justice.

Even though we know that policemen, firefighters, prison guards and hospital workers have in fact gone out on strike, can we afford to legiti-

mize such stoppages? It is true that we have survived these illegal strikes. We've somehow muddled through. Certainly strikes by public workers in less sensitive areas have not seriously impaired our ability to function. But, what of the strikes where the public health and safety are deeply affected? In such cases, what if an eighty-day cooling-off period fails to produce agreement? Can we expect the public to coolly contemplate the next step, if that step is a strike? Companies, and their customers, do "take a strike." The employer plans his strategy to include the prospect of a work stoppage; his tactics may include an effort to operate at least on a skeleton, emergency basis. Do we have the right to expect that the public employer, and his "customers," may plan similarly in the event a strike occurs in a vital service? The facts indicate that some public service employers have undertaken precisely this kind of planning, and have done it successfully.

New York City has had its public strikes. Injunctions, contempt citations, fines and jail sentences have all been part of the scene. Instead of the usual panic, one could, if he stretched his mind, conceive of a news report on the eve of a strike that calmly advises us: "CITY CONFIDENT OF MEETING NEEDS AS STRIKE NEARS; EXPECTS 4000 SUPERVISORS TO HANDLE THE CHORES OF 20,000 UNION MEMBERS." The news story goes on: "As Local One of the Union gathered its red, white and blue picket signs and public officials brought in coffee pots to ease their extended hours, the big question remained—can the agency meet the needs of the public without the help of 20,000 striking employees? Yes, was the employer's firm prediction. . . . The agency has asked the public to use only essential services during the peak demand period between 4 P.M. and 9 P.M." Described here could have been a stoppage, for example, by the city's water department employees. But, this is not likely, considering the employer's obvious willingness to "take" the strike. We know how public employers normally react and fantasy can only be carried so far. The story, however, with only minor paraphrasing, is one that did appear on the front page of *The New York Times* on December 1, 1968. The strike, which did take place, was by the public service employees of the electric utility of New York City. Certainly, the public health and safety were theoretically jeopardized; yet, the workers, covered by National Labor Relations Board, were protected in their right to strike, and indeed, did strike. The public service employer, sensitive to the right of the employees to strike despite the fact that they had never chosen to strike before, planned nevertheless for that eventuality. When it came to pass, the agency "took" the strike, bargaining continued at a faster pace than before, and an agreement was reached. No firings, no fines, no jail terms, no injunctions, no lasting bitterness, and happily, no serious deprivation of a vital public service.

Playing it "cool" may not be a panacea, but it certainly helps. We panic at the thought of a strike by prison guards; yet, this represents probably the simplest security situation to contain. Neither the army nor the national guard may be capable of carrying on an inmate rehabilitation program, but both are of course capable of maintaining order in a prison. At the very least the public will be protected from the prisoners. At the very worst the inmates, during a strike, will be relieved of participation in what are, generally, woefully inadequate rehabilitation programs.

If New York City was able to "take" a strike of its electric employees, should we expect our cities to absorb a stoppage of water service? Extensive automation and skillful use of supervisory personnel enabled the electric utility to ride out the strike. Water service lends itself equally to automated devices; but what of the supervisory question? The private utility, subject to National Labor Relations Board rules, not only has had its foremen and supervisors excluded from the bargaining unit for some years, but has undoubtedly worked hard to develop a disciplined managerial cadre. The city's water department, although also a utility, has never been under the National Labor Relations Board. Typically, in such cases, supervision fails to thoroughly identify with either the union or management, and some may indeed be union members at the time a stoppage occurs. The ability of the water utility to "take" a strike is clearly reduced.

Hospitals provide another area of vital service. Here, too, the current situation suggests that new methods and the effective deployment of professional supervisory personnel should permit at least essential functions to continue. Automatic power systems are nearly universal today in hospitals. Electronic surveillance techniques are available as replacement for physical observation of patients. If hospitals in a given area were to cooperatively use the devices and techniques accessible to them, instead of indulging in unnecessary and wasteful competition, their ability to withstand strike threats would be enhanced. Only the most inefficient hospitals are entirely unable to cope with a stoppage, in part because in such situations professional personnel are probably as disenchanted as are rank and file workers.

The general public in other democratic nations appears to have accommodated itself to the inconvenience of public employee strikes. Totalitarian countries of course do not tolerate strikes at all. But, in Italy, where there has been a recent rash of public worker stoppages, citizens are now urged to pick up their telephones upon arising and "Dial-a-strike" to learn whether the mail is being delivered, the garbage is being picked up, the banks are taking deposits, or—if the phone company is operating. Of course the "dial-a-strike" message itself is recorded and automated!

The discussion turns again to police and fire services. Should we permit such workers National Labor Relations Board coverage and the right to strike? We do not now provide for either. Yet, police and firefighters do organize, they seek to bargain collectively almost always for both rank and file *and* officers, and despite the no-strike laws, they do on rare occasions get "sick" or find it necessary to go into extended "study" sessions. They have even struck outright. No-strike laws do not appear to deter strikes in any section of the public service.

On the contrary, I have suggested that workers, including public employees and particularly those employed in essential services, experience internal restraints regarding strikes that are far more compelling than repressive laws. It has been my contention that the unrestricted right to strike, without exception, is a more reliable deterrent to irresponsible action than is the restrictive statute. Emergency disputes have been handled far more effectively under National Labor Relations Board procedures than has been the case in similar crises outside the jurisdiction of the National Labor Relations Board. If our concern is for peace and justice in labor relations, than we should not hesitate to extend the coverage of the National Labor Relations Act to state and local government employees. If, however, our expressed alarm over public strikes is merely a mask to maintain fifteen percent of the American work force in economic subjugation, then we will resist efforts to apply the National Labor Relations Board to the public service.

It is a sad irony that observers of the public scene have attempted to perpetuate separation on the premise that private strikes are "economic," and public strikes are "political." In a generally penetrating article,[10] Jack Stieber insists that "The economic and market pressures which operate in private industry do not exist in the public sector." I suspect that they are largely the same for both employers and employees in the private and public sectors. For public workers, particularly, "economic pressures" are devastating. It is only when we contemplate the gap in wages and benefits between those employed in public as opposed to private enterprise that we begin to appreciate the magnitude of our problem. Closing the gap in the nation's labor law is an essential first step. But procedures alone will not bridge the economic gap. That issue is yet to be resolved. Our immediate task is to provide the rules best calculated to assure that the path to economic justice for public employees will be a reasonably peaceful one.

[10] L. Ullman, Collective Bargaining in the Public Sector, Challenge to Collective Bargaining 65-88 (Prentice-Hall, 1967).